

Maryland. At the hearing on August 17, 2005 before the CCOC Hearing Panel, Complainant offered her own testimony and presented eight (8) exhibits.

Complainant testified that, on or about October 2, 2003, she submitted a request to the Respondent to construct a deck in the rear yard of her townhouse which was denied by a letter dated January 20, 2004 from the Respondent. The letter of January 20, 2004 and the original written application were admitted as Complainant's Exhibit #2 (the written application and attachments were also eventually admitted as Respondent's Exhibit #3). The original application was for a plastic, natural wood-like lumber deck with the lower portion enclosed by decorative lattice. The Complainant testified that the lattice screening was not approved by Respondent.

Complainant testified that the deck construction project was delayed for several months during which she suffered from various medical problems. She then testified that in May 2004 she consulted with an architect. Together, they designed a new version of the deck and applied to Montgomery County, Maryland for a permit. Complainant stated that because of the county's rigorous requirements, she at first had difficulty finding a carpenter to build the deck. The new deck design included two six foot structures running along the sides of each side of the deck, which Complainant described as privacy screening or privacy rails. Complainant admitted that the privacy screening was never approved by the Respondent, and that the original approval of her deck specifically disapproved the decorative lattice screening in her original request.

Exhibit #6 introduced by Complainant, consisting of a series of pictures of various homes on pages 6-1 through 6-6, was admitted, although pages 6-3 through 6-6 were admitted over the objection of Respondent, which complained that the location of the houses shown was insufficiently identified by Complainant. Complainant was able to identify the location of one neighboring house, 1202 Elm Grove Circle, shown on pages 6-1 and 6-2, which has a small privacy screening on one portion of the deck. The other photographs showed other decks with various types of screening, but Complainant was unable to identify those pictures with addresses in the Oak Springs townhouse community. It was the contention of Complainant that the Respondent had been lax in enforcing its architectural guidelines as to privacy screening by permitting other types of screening. Complainant further complained that many fences and decks were in disrepair in the community and that the Respondent was lax in its enforcement of community maintenance.

Complainant presented no evidence as to whether the screening on any other houses had been approved by the Respondent and also presented no evidence that the Respondent had acquiesced in the construction of unapproved screening in the neighborhood. Complainant further presented no evidence as to whether Respondent had cited or failed to cite any neighbors for the state of disrepair of their decks or fences.

Complainant then introduced two "petitions" which were located on pages 90 and 91 of Commission's Exhibit #1, and which were admitted over Respondent's objection. The petitions were purportedly signed by twelve neighbors supporting her privacy screening. It was the testimony of Complainant that only one of the twelve neighbors identified themselves as renters,

however, on cross-examination she admitted that she did not inquire about ownership status of each signatory to the petitions. Later in the Respondent's case, Todd Hassett, the management agent for Respondent, testified that five of the twelve petitioners were renters.

On cross-examination, Respondent asked Complainant to identify Respondent's Exhibits #1 and 2, which Complainant identified as showing pictures of her home and 1202 Elm Grove Circle, respectively. Complainant admitted that the structures are different, but contended that her structure was more consistent with the other community architectural features since it was virtually identical to the neighborhood fences.

Respondent moved to dismiss the Complainant's complaint at the end of Complainant's case and the Panel took that motion under advisement.

Todd Hassett, management agent for Respondent, employed by The Management Group, was called as Respondent's first witness. Mr. Hassett testified that the structure erected by Complainant was a board-on-board six foot fence rather than a "privacy screening," was never approved by the Respondent and was inconsistent with the neighborhood architectural style and guidelines. Respondent presented several exhibits outlining the requests of Complainant for approval and reconsideration along with the copies of the minutes of several Board of Directors meetings in which her requests were discussed and the fence screening disapproved. All such exhibits, being Respondent's Exhibits #s 4 through 7, were admitted. Mr. Hassett further testified that he did not recognize any of the privacy screens on the other houses shown on Complainant's Exhibits 6-1 through 6-5 other than those of 1226 and 1202 Elm Grove Circle which had been identified by Complainant, and he further testified that he surveys the community at least twice a year to identify violations of covenants and unapproved structures. Any such violations are noted and letters sent to the offending owner, according to Mr. Hassett. He further stated that no violation was ever cited for the structure at 1202 Elm Grove Circle because it was so innocuous.

Respondent then called Mr. Beneficiary Lonto, the secretary of Oak Springs Townhouse Association, Inc., who testified that the Board of Directors functions as the architectural review board for the Respondent, in accordance with the governing documents. He and Mr. Hassett further testified that Complainant was the only person who responded to the recent solicitation for volunteers to serve on an architectural review committee for the Respondent, and that the Board of Directors did not consider it proper at this time to appoint her as chairperson of such a committee while this proceeding was pending.

At the close of Respondent's case, Respondent requested that the Commission assess attorney's fees against Complainant as a result of Respondent's contention that the Complaint was completely without merit or justification. Respondent's Exhibit #8, the invoice of its attorney, Jeffrey Van Grack, Esquire, in the sum of \$2,528.30 was admitted. The record was left open following the hearing for a period of seven days in order to permit Respondent to supplement the invoice with the August billings on this matter. On August 23, 2005, Respondent submitted August billings in the sum of \$2,411.50. The final invoice for attorney's fees incurred by Respondent in the matter is, therefore, in the sum of \$4,939.80.

Conclusions of Law and Discussion

Upon a review of the organizational documents of Oak Springs Townhouse Association, Inc., the testimony and other evidence submitted as set forth above, the Panel concludes as follows:

1. **Screening Was Never Approved.** Complainant has presented evidence that she has erected a screening structure on her deck which was not approved by the Board of Directors of Respondent. She contends that the structure which she erected without permission should be permitted even without Board approval because other houses in the community have similar structures and the Board has not taken steps to require that those structures be removed. She further contends that the Board should have approved her structure since it is harmonious with the other architectural features of the community such as the fences. The Panel finds all of Complainant's arguments to be without merit. The Declaration of Covenants and Rules and Regulations of the Respondent require that any structure must be first approved by the Board of Directors for compliance with the governing documents and harmony with the other features of the community. An examination of Respondent's Exhibit # 1, the photograph of the deck on Complainant's house, plainly shows that the Complainant's structure is a large, visually solid wall of fencing, blocking the view of and through the deck on two sides. Respondent's Exhibit #2 shows that the structure on 1202 Elm Grove Circle is, in contrast, a shorter, visually transparent screening consistent with the deck railings below. The two structures are as different as night and day, and the Panel finds Complainant's insistence that the two are somehow similar to be false. While the Panel finds that Complainant was unable to identify the addresses in the other photographs introduced into evidence, the Panel also finds that, even if those screenings are located in the Oak Springs community, and even if they had been approved by Respondent, none of those screening panels resemble the screening fence erected by Complainant. Therefore, the Panel finds that the Respondent has not waived its rights to enforce its covenants by any action or inaction on its part that would limit or prevent it from enforcing the covenants regarding the fence screening constructed by Complainant.
2. **Attorney's Fees.** Respondent has moved for attorneys fees under the provisions of Montgomery County Code, §10B-13 (d), which permits the hearing panel to award costs and attorney's fees to any party under certain circumstances. In this case, Respondent contends that the Complainant has "filed or maintained a frivolous dispute, or filed or maintained a dispute in other than good faith." While the Panel does not believe that Complainant subjectively believes that her Complaint is without merit, the Panel agrees with the Respondent that the claims of Complainant are so specious as to be frivolous under any objective criteria. Complainant did not have approval to build the structure with the screening and should have immediately taken the structure down when ordered to do so. Complainant argued that she had requested mediation but that Respondent had insisted that the matter go to the hearing panel

instead. While §10B-13 (d) (2) permits a panel to assess costs against a party if it "unreasonably refuses to accept mediation" it does not appear that the Respondent's reluctance to go to mediation was wholly unreasonable, since the delay in time from the filing of the Complaint to the hearing date was a result of delays by Complainant, and, the only reasonable result of any mediation would be that Complainant had to take down the unapproved structure. The Panel can find no area of compromise which could have been reached in mediation. Nevertheless, the Panel believes that mediation may have been effective in convincing Complainant that she should not proceed further with the complaint, thereby reducing the attorney's fees of Respondent, and further, the Panel believes that mediation should be encouraged as a means to resolve disputes and reduce the effects of attorney's fees. Therefore, the Panel has agreed to the award of costs of attorney's fees against Complainant only in a limited amount as set forth below.

ORDER

Based upon the evidence on the record and for the reasons set forth above, it is this 21st day of September, 2005, by the Commission on Common Ownership Communities:

ORDERED, that, within thirty (30) days following the date of this Order, the Complainant shall take down the unapproved fence screening on her deck at 1226 Elm Grove Circle, Silver Spring, Maryland and replace it with approved railings; and it is further

ORDERED, that, within thirty (30) days following the date of this Order, Complainant shall reimburse Respondent the sum of \$1,500.00 for costs and attorney's fees incurred as a result of the filing of Complainant's frivolous Complaint.

Panel Members Antoinette Negro and Andrew Oxendine concur unanimously in this decision.

Any party aggrieved by the action of the Commission may file an administrative appeal to the Circuit Court of Montgomery County, Maryland within thirty (30) days from the date of a final Order, pursuant to the Maryland Rules of Procedure governing administrative appeals.



Louis S. Pettey, Panel Chair

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